IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

No. 351

R. V. ARCHAWSKI, et al.,

*Petitioners,*

v.

BASIL HANIOTI, etc.,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners, three hundred and fifty odd, prospective passengers of the steamship *City of Athens*, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled matter.

### The Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York (R. 317-324, Walsh, D. J., sitting in admiralty, printed in the separate appendix hereto infra pp. 5-11) is reported in 129 F. Supp. 410.

The opinion of the Court of Appeals for the Second Circuit (Frank, Medina and Hincks, C. JJ., opinion by Medina, C. J.) is printed in the separate appendix infra pp. 1-3 and is not yet reported.

## Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit sought to be reviewed, was entered on June 3, 1955.

Jurisdiction of this Court is found in 28 U. S. Code Secs. 1254(1), 2101(c) and 2106

## Questions Presented

1. Whether admiralty has jurisdiction of actions seeking the recovery of passage monies paid as consideration for maritime contracts of carriage which were never performed or substitute transportation provided.

2. After the proofs are in, whether jurisdiction of the subject matter in admiralty is controlled by allegations of the libel as construed by the application of the technical common law rules of pleading, or by the proofs as reconciled to the libel under admiralty's liberal rules of practice.

3. Whether the Court of Appeals had jurisdiction of an appeal taken from a final decree in admiralty 108 days after its entry where there was no extension of time within which to appeal granted by the District Court.

## Statutes Involved

"*28 U. S. C. A. 2111.* On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

"*28 U. S. C. A. Supreme Court Admiralty Rule 2.* In suits in personam the mesne process shall be by a simple monition in the nature of a summons to appear and answer the suit, or by simple warrant of arrest of the person of the respondent in the nature of a

unbeknownst to them, hopelessly insolvent, and that, on July 21, 1947, he abandoned the vessel and projected voyages and fled the United States to Europe; that he had converted the unearned passage monies and had secreted himself away and so manipulated his assets to make himself judgment-proof for the purpose of defrauding the libelants and was shielding himself behind another dummy corporation which was his alter ego. Process was prayed with the further request that if Hanioti could not be found that goods and chattels to the credit of his alter ego, Basile Shipping Company, Inc., and particularly a vessel known as the *Carmen*, then in New York, be attached. The *Carmen* was thereupon attached by the U. S. Marshal and Hanioti appeared by counsel and answered the libel, under oath, generally denying the allegations. Thereafter a series of defaults on his part ensued to the extent of disregarding peremptory orders from the Bench and a refusal on his part to co-operate with his proctors of record.

Finally the action duly came to trial and Hanioti defaulted in personally appearing, but was represented by his proctors of record. Libelants put in their proofs, consisting, inter alia, of Hanioti's own testimony under oath and his general passenger agent's testimony under oath, both taken before the U. S. District Court for Baltimore, Maryland, in another action wherein a statutory lienor had libeled the *City of Athens* in rem and in which the libelants herein had intervened in an effort to establish a lien against the vessel for their respective fares. In addition, to support the only effective means of execution that would be necessary in the action, proofs of Hanioti's fraudulent acts, such as transfers of property, concealment, the dummy corporate set-ups and his absconding, were made.

Final decree, with provision for body execution to issue if the decree were not satisfied, was entered on December 6, 1954 (A. 12, 13). The very next day, December 7, 1954, Hanioti, still concealed and in hiding, by new counsel moved to vacate the final decree and the order providing for body

execution. After extensive hearings, in which Hanioti's appearance was directed by the Court and during which he deliberately perjured himself, the Court denied the motions with an extensive opinion under date of February 9, 1955 (A. 5).

Hanioti noticed his appeal (A. 4) from the final decree on March 24, 1955—108 days after entry of the final decree.

Despite libelants' timely motion to dismiss (R. LXV-LXXII) the respondent's appeal and the knowledge that he had deliberately removed himself from the jurisdiction of the Court, the Court of Appeals for the Second Circuit reviewed on the respondent's appeal and reversed the District Court upon the ground that the District Court had not jurisdiction of the subject matter of the action, stating:

> "The record before us presents a maze of complications, procedural and otherwise. Of the various points raised, however, it is necessary to discuss but one, as we have concluded that there was no jurisdiction in admiralty and, there being no other *alleged* basis of federal competence, the case must be dismissed." (Emphasis supplied.)

The Court then summarized the essential allegations of libelants' causes of action for return of their respective passage moneys in the following language (A. 2):

> "It is then alleged that between November 9, 1946 and July 23, 1947, Hanioti and his alter egos 'then being hopelessly insolvent, unbeknown to any of the libelants', advertised the *City of Athens* as a common carrier of passengers for hire, that libelants paid certain sums as passage money for a voyage scheduled for July 15, 1947, and that both the voyage and the vessel were abandoned by Hanioti."

As the basis for its conclusion of no jurisdiction, the Court, however, proceeded to extract further clauses from the libel without considering the proofs in conjunction with the essential allegations and the general tenor of the libel, stating:

> "While a contract for the transportation of passengers by sea is a maritime contract and a suit for its enforcement would plainly be within the admiralty jurisdiction of the District Court, this libel sets forth no such claim, but rather is in the nature of the old common law *indebitatus assumpsit*, for moneys had and received, based upon a wrongful withholding of the moneys by respondent, on the theory that in equity and good conscience he is under a duty to pay them over to libelants."

As authority for this construction and its dismissal of the libel it cites its *Silva* v. *Bankers Comm'l Corp.*, 163 F. 2d 502, and *United Transportation & L. Co.* v. *N. Y. & Balt. T. Lines*, 185 F. 2d 386, cases.

## Reasons for Allowance of the Writ

1. The Court of Appeals for the Second Circuit has rendered a decision herein which is in direct conflict with a decision of this Court, *Krauss Bros. Lumber Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117; 78 L. Ed. 216, as well as a decision of the Court of Appeals for the Fourth Circuit involving the very subject matter of the instant case. That Court, sub nom. *Acker et al.* v. *The City of Athens*, 177 F. 2d 961, affirmed the District Court of Baltimore for the reasons asserted by that Court in its lengthy, scholarly opinion, sub nom *Todd Shipyards* v. *The City of Athens*, 83 Fed. Supp. 67, and in which, in denying enforceability of the libelants' claims *in rem*, that Court stated (p. 64):

> "These contracts of affreightment for passenger transportation, *although maritime contracts of which the admiralty court would have jurisdiction*, do not constitute maritime liens, * * *" (Emphasis supplied.)

In the *Krauss* case, where the situation is closely analogous to that here, the libelant brought an action both, *in rem* and *in personam*, to recover an overpayment of freight and seeking, also, to establish a maritime lien for the overpay-

ment. Upon exceptions, the District Court dismissed the libel for want of admiralty jurisdiction (52 F. 2nd 492) and the Circuit Court of Appeals reversed the decree insofar as it dismissed the libel *in personam* but affirmed so much of it as dismissed the libel *in rem*. The latter point brought the action before this Court and during the argument, it was contended by the respondent that inasmuch as the payment for excess freight was made under a mistake, the demand therefore was upon a cause of action for *money had and received* which would lie only at common-law and not in admiralty. Commenting on that argument, this Court stated (290 U. S. 124):

> "Admiralty is not concerned with the form of the action, but with the substance. Even under the common-law form of action for money had and received there could be no recovery without proof of the breach of the contract involved in demanding the payment, and the basis of recovery there, as in admiralty, is the violation of some term of the contract of affreightment, whether by failure to carry or by exaction of freight which the contract did not authorize. (Citations.)"

2. Important questions relating to the scope of admiralty jurisdiction and its exercise are in issue:

Assuming, arguendo, that the nature of libelants' actions are as construed by the Court of Appeals and that the yardstick used by it in arriving at such construction was proper, if a shipowner can sue in admiralty for freights due to him then the payor of the freights or passage money should have the reciprocal right to sue in admiralty for the recovery of his prepaid, unearned, freights which the shipowner is obliged to refund to him. Otherwise, the oft waved banner of "equality under the law" or "equal application of the law" becomes a mere fictional expression. Thus, long ago in the *Moses Taylor*, 71 U. S. 411; 18 L. Ed. 397, this Court held that:

"There is no distinction in principle between a contract of this character (passenger affreightments) and a contract for the carriage of merchandise. The same liability attaches upon their execution both to owner and the ship. The passage money in one case is equivalent to the freight in the other. A breach of either contract is the appropriate subject of admiralty jurisdiction."

A factually pointed case where the passenger paid his fare and did not receive the transportation was *The Eugene*; D. C. Wash., 83 Fed. 222, also id. 9 Circ. 87 Fed. 1001. But there, like the libelants herein intervening in the *in rem* action in Baltimore, the question turned on whether the passenger had a maritime lien so that he could enforce his claim for refund *in rem*. And, in *The Guardian*, 89 Fed. 998 (D. C. Wash.), it was held that admiralty had jurisdiction *in personam* for the recovery of the amounts paid for passage when the contract is breached.

A situation, analogous to the case at Bar, except that shippers of cargo rather than passengers were involved, is *The Henry W. Breyer*, 17 F. 2nd 423 (D. C. Md.), in which the shipowner was likewise insolvent at the time he was soliciting the cargos and receiving the prepaid freights. The Court there held that the shippers' actions for recovery of the unearned, prepaid, freights were both, in contract and tort, and within the admiralty jurisdiction. Extensive and sound reasoning is set forth in the *Breyer* case which easy happened to be cited by Judge Hand in the *Silva* case, *supra*.

But the *Silva* case, cited by the present Court of Appeals in the instant case as authority, is distinguishable. There, the shipper sued an *assignee* on the law side of the Court. The shipowner had assigned the unearned freights to the assignee and the assignee took them with full knowledge of the shipowner's insolvency and that they were unearned while it also actually controlled the movements of the vessel. The theory of recovery and of the action was that of a constructive trustee. Nor, is *United Transp. & L. Co.* v.

*N. Y. & Balt. T. Line, supra*, cited by the Court of Appeals, apposite. There in an action in admiralty to recover payment for lighterage services rendered, the respondent interposed a counter-claim, or set-off, for an overpayment allegedly made upon some other and previous contract which overpayment resulted from the fraud of an individual who was an officer of both, libelant and respondent corporations, litigants in the action. There, the fraud had nothing to do with the contract that was the subject of the suit but concerned an entirely separate contract and transaction. The Court dismissed the counter-claim as not within admiralty's jurisdiction because it was not the type of counter-claim which could be set up as a breach of a maritime contract in a separate suit and which breach would be the key to the resulting damages or overpayment.

On the other hand, a recent decision by the U. S. Court of Claims, *Isthmian Steamship Co.* v. *The United States*, 130 F. Supp. 336 dismissed an alleged common-law action for the recovery of freights by a shipowner, holding:

> "A suit by the owner of a vessel for freight money is a suit on a maritime contract. The fact that defendant admits liability does not change the character of the action from a maritime one to a common-law one; *plaintiff's claim is still for freight, which is a maritime cause of action.*" (Emphasis supplied.)

"Freight", the consideration for a vessel's services, has always been a subject matter clearly within admiralty's jurisdiction. Whether the instant action be characterized, in form, as one for "money had and received" pursuant to a maritime contract, or one for damages measured by the amounts paid and resulting from the breach by failing to transport or, as one for damages to the extent of the sums paid, arising from the breach of the duty to refund which is annexed to the contracts of carriage by law, simple logic dictates that the duties are as maritime as the contracts themselves. Under the contracts of carriage the passengers had the duty to prepay their fares while the respondent

had the duty of transporting those who had done so or to provide substitute transportation. For failure to perform, the shipowner was obliged to refund the unearned fares. The fares—or "freights"—were maritime, the contracts were maritime, the shipowner's duty to transport was maritime, the failure to transport is a breach of a maritime contract, and the duty to refund is just as maritime as the freights and the contracts.

A century ago, in *Cobb* v. *Howard*, 5 Fed. Cas. 2925, affirmed by the 2nd C.C.A. in 5 Fed. Cas. 2924, it was held that the duties connected with passenger contracts for marine transportation were as maritime as the contracts themselves and that the causes of action by the passengers therein for the recovery of the passage moneys "had and received" by the defaulting carrier were as maritime as the contracts and clearly within admiralty's jurisdiction. See also: *The Pacific*, Fed. Cas. No. 10643, cited therein.

3. The fact that the shipowner is actually insolvent at the time of procuring the passage monies and issuing the contracts and thereby is constructively guilty of fraud, as a matter of law, does not destroy the maritime nature of the action or limit the remedy to a common-law action. Neither does the conversion of the freights destroy the maritime nature of the action. Those allegations and proofs were ancillary to the main causes of action and clearly necessary to support the prayer for coercive relief as well as the foreign attachment, which are simply equitable powers with which admiralty is clothed once acquiring jurisdiction. *Swift & Company Packers, et al.* v. *Compania Colombiana Del Caribe, S.A.*, 339 U. S. 684, 1950 A.M.C. 1089.

If the Court of Appeals be correct in the narrow construction it accords to the action, viz: "money had and received" this Court has never passed upon the point as to whether an action would lie in admiralty for the recovery of moneys had and received pursuant to a maritime contract, except as previously pointed out in the *Krauss* case.

*supra*. Commentators have thought, however, that if any doubts existed as to admiralty's jurisdiction over such actions, they were dispelled by the *Krauss* case. 47 Harv. L. Rev. 519, 520; 34 Col. L. Rev. 358, 359. Thus, if the freights of the passengers were still intact in the respondent's hands upon the institution of suit, under the decision of the Court of Appeals, though they are a subject matter for admiralty insofar as a shipowner is concerned, the District Court would not have admiralty jurisdiction for their recovery by the libelants. On the other hand, this Court in the *Eclipse*, 135 U. S. 599, 608, which it cites in the *Swift* case, *supra*, states:

> "The jurisdiction embraces all maritime contracts, torts, injuries or offenses, and it depends, in cases of contract, upon the nature of the contract, and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation."

Equal application of the law, or equality under the law, requires that if a shipowner can sue in admiralty for freights due to him for performance of a maritime contract, then the shippers or passengers have the reciprocal right of suing in admiralty for the recovery of freights "had and received" by a shipowner who breaches his maritime contract by failing to perform the contract, or by failing to refund upon demand following the breach. The rights, duties and liabilities of each are as maritime as the contracts and freights and within the admiralty jurisdiction.

4. In failing to construe the libel in the light of the proofs, the Court below ignored 28 U. S. C. 2111 which required it to allow amendment of any technically defective allegations.

The yardstick of review by the Court of Appeals in this admiralty action was not only contrary to decisions of this Court but contrary to its own decisions. In the *Syracuse*, 79 U. S. 382, on this very point this Court has stated:

> "... in admiralty, an omission to state facts which prove to be material but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libelant, if the Court can see there was no design on his part in omitting to state them." (Citations.)
>
> There is no doctrine of mere technical variance in admiralty, and subject to the rule above stated, *it is the duty of the Court to extract the real case from the whole record, and decide accordingly.*" (Emphasis supplied.)

Without regard to the mandate of 28 U. S. C. A. 2111, as its opinion reveals, the Court of Appeals did not examine into the record or proofs, which clearly showed admiralty jurisdiction, but confined itself to analyzing only the libel. The very opening of the libel (A. 14) distinctly and affirmatively alleges pursuant to Adm. Rule 22

> "in causes of *contract*, civil and maritime" (emphasis supplied)

and concludes with the final prayer (A. 17)

> "that this honorable Court may be pleased to grant its decree or decrees for the respective damages of each of the libelants herein, with costs and such other and further relief as in law and justice they may be entitled to receive."

Moreover, the Court's summary of the libel, quoted *supra* p. 7, contains the essentials of a maritime cause of action.

The strained, prejudicial construction placed upon the libel could only arise by virtue of its application of principles of construction of pleadings akin to the narrow New York Civil Practice Act and Rules and its failure to heed the liberal admiralty rule, and 28 U. S. C. A. 2111.

It has long been the admiralty rule (recently adopted on the law side of the Federal Court) that if upon the facts established the libelants can recover upon any proposition of law within the admiralty scope of jurisdiction, the libel

must be sustained. In *Dupont v. Vance*, 60 U. S. 584, 587, this Court has held that:

> "* * * there are no technical rules of variance, or departure in pleading, like those in the common law, *nor is the Court precluded from granting the relief appropriate to the case appearing on the record, and prayed for by the libel*, because that entire case is not *distinctly* stated in the libel. * * * The Court decrees *upon the whole matter* before it." (Emphasis supplied.)

Nor does some inaccuracy in the statement of subordinate facts or of the legal effect of the facts propounded preclude the Court from awarding any relief, which the law applicable to the whole case warrants. *The Gazelle*, 128 U. S. 496.

In *Dampskibs Aktiesselkabet Thor* v. *Tropical Fruit Co.*, 281 Fed. 740, 742, the same Circuit (different judges) cited the doctrine enunciated by it in its *Volunteer* case, 149 Fed. 723, to wit:

> "* * * that it is the practice in Admiralty to bring all parties before the Court, and to determine the controversy on the merits as it appears from the proofs *regardless of the technicalities of pleadings*—always assuming (as may be done here) that no party is surprised or injured by that equitable proceeding." (Emphasis supplied.)

The proofs showed the dates of payments by the libelants, their scheduled voyages and itineraries, the issuance of passage contracts to them, the abandonment of the vessel and voyages by the respondent, the demands for refund of their respective passage moneys by the libelants and the failure to make any refunds to them. The proofs aforesaid were by sworn admissions of the respondent and his general passenger agent for the vessel. The damages sought by the respective libelants, as the libel indicates, is measured by the amounts paid for passage respectively. While they were entitled to sue for additional damages such as coming

to New York, putting up in hotels, etc. anticipating departure of the vessel (Cf. *The Normania* (S. D. N. Y.) 62 Fed. 469), they were deliberately not included because of the impracticability of proving each passenger's additional damage for the reason that they are scattered throughout the world and the costs of proving such incidental damages would far exceed those damages.

The subordinate allegations of fraud and concealment were likewise established by admissions under oath of the respondent and were absolutely requisite under the circumstances attendant to the case and the respondent, for, without some coercive relief a decree of the District Court, or any court for that matter, would not be worth the paper upon which it was printed.

The Court of Appeals, unfortunately, blended the subordinate allegations into the causes upon the contracts. Upon the facts established (which the Court of Appeals did not consider or use in its yardstick of review) clearly the decree is sustainable upon the theory of breach of a maritime contract—the failure to perform the transportation service.

But if the only cause of action, upon the facts coupled with the allegations in the libel, be that for money had and received pursuant to a maritime contract for transportation, then the decision of the Court of Appeals is novel and is a curtailment of admiralty's traditional jurisdiction. See: *U. S. Fleet Corp.* v. *Banque*, (3rd Circ.) 286 Fed. 918; *The Oregon*, (6th Circ.) 55 Fed. 666, 667; *Talsumma K.K.K.* v. *Rob't Dollar Co.*, (9th Circ.) 31 F. 2nd 401.

Every payor of money to a shipowner as consideration for the performance of a marine contract, whether it be for transportation, towage, operations or any marine services, would pay at his own peril. The recipient would have the benefits and privileges of admiralty's jurisdiction, but the payors would be relegated to the confusion and technical obstacles of the common-law courts, as they exist, dependent upon their particular geographical locations.

Such a result, if the Court of Appeals curtailment of admiralty's jurisdiction as indicated in its decision is permitted to stand, would seem contrary to the Constitutional grant of judicial power "to *all* cases of admiralty and maritime jurisdiction." *U. S. Const. Art. III, sec. 2.*

5. The action of the Court of Appeals in reviewing and reversing the District Court constitutes a serious question as to whether it could acquire appellate jurisdiction by a notice of appeal from a final decree in admiralty taken 108 days after its entry when the time within which the appeal must be taken had not been extended by the District Court as required by 28 U. S. C. 2107.

## CONCLUSION

**For all of the above reasons, a writ of certiorari, as prayed for, should be granted.**

Respectfully submitted,

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